The Madras Law Journal

Vol. XXVI] APRIL, 1914. [Part XIII.

NOTES OF INDIAN CASES.

Ganesha Rao v. Tulja Ram Rao, I. L. R. 36 M. 295 (P. C.) Wherever a new statute is passed, it is always a matter of some nicety as to how far the new statute affects pre-existing law and how far it is to be read subject to it. The construction of the Civil Procedue Code has not been free from this trouble though it affects only procedure and *prima facie* need not much conflict with pre-existing law. Courts were at one time very much exercised as to how far it was consistent with the Civil Procedure Code to allow the Karnavan to sue on behalf of the family. The question whether the managing member of a Hindu family could sue without making the other members parties can hardly be said to be a settled point even now though the Privy Council decision in *Kishan Prasad* v. *Har Narain Singh* [1] has considerably smoothened the conflict. Again, there has been discussion whether the managing member could be said to be a person entitled to give a discharge within the meaning of S. 8 Limitation Act, (7 of the present act). Another question has been whether the managing member or the Karnavan who is also the guardian of his minor coparceners is bound to furnish security before receiving moneys in execution *Harihar Pershad Singh* v. *Mathura Lal* [2] and *Ganesha Row* v. *Tulja Ram Row* [3]. There were questions as to the rights of the managing members to execute decrees in favour of the family, about the application of S. 30, C. P. C. (O. 1, R. 8) about the binding nature of the decrees against widows and managers, about the reversioner's rights to re-open satisfaction entered up by widows—and numerous other questions arising out of the apparent conflict between the provisions of the Code as to "recognised" agents and the general law permitting some people to represent others. The Madras Court had held applying the theory that the Civil Procedure should be read subject to the personal law of the parties that the manager of a Hindu family would not be disentitled from exercising his power as such manager because he happens to be the guardian *ad litem*

1. (1911) I. L. R. 33 A. 272. 2. (1908) I. L. R. 35 C. 561.
3. (1909) 21 M. L. J. 1093.

of one of the minor co-parceners. The Privy Council judgment under notice over-rules this decision. Their Lordships hold that the managing member cannot under those circumstances affect the interests of the minor by compromising without leave. Their Lordships decide the question on the language of S. 462 (O. 32, R. 7). If this decision is taken to lay down that in no case the Civil Procedure should be read subject to the Hindu Law, there might be difficulty in reconciling it with the decision in 33 A. 272. As their Lordships express no opinion on the general theory, it is safer to take it that their Lordships proceed merely on the language of the section. But even so in the light of their Lordship's decision, the decisions of the High Courts in India on at least some of the points noted above might require reconsideration. For instance it is clear that the decisions that dispense with security in the case of managing members cannot stand. It is difficult to see any distinction in principle between O. 32, R. 7 and R. 6. The refinement of *Mitra* J. based on the indefiniteness of the minors' interest is equally applicable to R. 7 but was disregarded by the Privy Council. The decision of their Lordships may have even the effect of frustrating the object of the Legislature in recasting section 8 of the old Limitation Act. Assuming that payment to the managing member is payment to the decree-holders within the meaning of O. 21, R. 1. O. 32, R. 6 has the effect, by expressly prohibiting such receipt without leave, of making it ineffective. As their Lordships do not express any opinion on the general theory, it may be that where minors are not involved the managing member can give a valid discharge and act generally so as to bind the other members. The fact that their Lordships leave the question open whether the managing member can bind the minor when he is not himself the guardian, seems to point to the conclusion that in their Lordships view, wherever the Code is not explicit, there is nothing improper in reading it subject to the provisions of the substantive law governing the parties.

In re **K. Ganapathi Bhatta**:—I. L. R. 36 M. 309. In this case the accused had made a complaint to the police that a theft took place in his house and that he suspected two people whom he named and who were his enemies. On enquiry it was found that no theft at all had taken place in his house. Sanction was accordingly given to prosecute him for an offence under Section 211, Indian Penal Code. He was acquitted on the ground

that the statement that he suspected the two people did not amount to making a charge against them. But the High Court in acquitting him observed that he might properly have been charged under Section 182, Indian Penal Code. The complainant accordingly applied for sanction for prosecuting the accused for that offence. But when prosecution was launched, the accused pleaded *Autrefois acquit*—Section 403, Criminal Procedure Code in bar. It was argued for him that the offence under Section 182 was one with which he could have been charged on the previous occasion under Section 236, Criminal Procedure Code and therefore the acquittal operated as a bar. The argument for the Crown was (i) that this was a case of an independent offence coming within Section 235 Cl. (i), Criminal Procedure Code; (ii) that as a sanction had not been taken for this offence at the time, of the previous trial the Court which tried the former offence was not competent to try the later offence. Their Lordships overruled both the contentions and held that the new trial was barred. Want of sanction which is curable under S. 537 cannot be a jurisdictional defect. Sanction under S. 197 and S. 188 might stand on a different footing though not necessarily. But as these questions are from their very nature not likely to arise in practice it is unnecessary to consider them. The conclusion seems to be unexceptionable.

Ramammal, *in re* :—I. L. R. 36 M. 387. and *Re* **Muthia Chetty** :—I. L. R. 36 M. 392.

In these cases, their Lordships lay down the proposition that the production of a forged document in obedience to a summons cannot by itself amount to using the document within the meaning of S. 471, I. P. C. The act is *an act in invitum* and the party cannot be held responsible for it. We do not see even why the accused should not rely on S. 76, I. P. C., the act for which he is charged being one he was bound by law to do. The protection that this decision affords will of course, be only co-extensive with the duty under S. 162 of the Evidence Act. Suppose a witness is asked to produce a document of a particular date, executed by a particular person &c. &c., is he bound to produce a documet which he knows is not such a document but only purports to be one such? But suppose the document is only tampered with in certain material particulars so as to make it forgery but agrees

with the description in the summons, obviously in such a case he must be protected. Suppose again there was a conspiracy between the party who wants the document and the party producing it in pursuance of which the one gets the other summoned and the latter produces the document which he knows to be forged. Should it make any difference ? Again suppose the man is put in possession of a forged document of whose forgery he is aware, after the service of summons ; would that make a difference ? In determining these questions, it may be necessary to bear in mind that it is hard as pointed out by their Lordships, to put the party to the risk of having to consider whether the document answering the description given in the summons is genuine or not. In this case, their Lordships were also of opinion that the fact that the party in addition to producing the document also swore to its genuineness could not make any difference. Their Lordships exclude the case of conspiracy which may stand on a different footing.

Narayana Kutti Goundan *v.* **Pachiammal**: (1911) I.L.R. 36 M. 426. In this case his Lordship Mr. Justice Sundara Aiyar points out that in applying the English and American cases on subrogation to Indian conditions, an important circumstance is generally forgotten *viz* that sec. 54 of the Transfer of Property Act requires a registered instrument for the transfer of mortgage securities and as such a mere agreement either with the mortgagor or the mortgagee cannot give a person lending money a mortgage lien over the property. His Lordship is of opinion that subrogation can be permitted without an actual assignment only in two classes of cases first, where the person having a previous interest in the property pays off a prior mortgage; secondly where a person believing himself to have title to the property discharges an incumbrance on it. His Lordship does not confine the word "interest" to such interest as would come within S. 91 of the Transfer of Property Act but would take it rather in the sense in which it is used in S. 69 of the Contract Act and would extend it so as to cover reversioners of a deceased Hindu. This view seems to accord with that taken in subsequent cases in this court and has the merit of being sufficiently liberal without at the same time encouraging officious payments.

Marudevi *v.* **Parimakka**:—I. L. R. 36 M. 203=22 M. L. J. 309; **Mathu Amma** *v.* **Gopalan** :—23 M. L. J. 496.

Important as these decisions are, for the points they actually decide, they are more important still from the point of view of sound progress. The attitude usually adopted towards matters Malabar is that they are a genus by themselves, incapable of progress, and requiring treatment however obsolete, provided it is hallowed by the name of Holloway, or some other worthy of Malabar reputation. That the so called peculiarities of Malabar law are in one respect at least, the result of a now exploded legal theory of Holloway, J. and had nothing to do with actualities, has we think been successfully shown by the referring judges in *Govindan Nair* v. *Sankaran Nair* [1]. Another fruitful source of error in Malabar is the confusion that is constantly made between legal rights and social customs or practices. The service done by these cases is in pointing out the necessity for distinguishing them. It is no function of the Courts to bolster up decaying social practices. Their duty is to enforce legal rights, taking the social customs as they are. For instance, take the case of Hindu Law. A sister is entitled to be married. How much is the brother bound to pay towards the expenses of the marriage? The practice of dowry may have recently grown up in the community and it might be impossible to marry the girl without paying a dowry. The Courts will feel no difficulty in including the dowry in the expenses of marriage. Why should Malabar Law alone be incapable of keeping pace with the requirements of society? It was once the practice among Malayalis for ladies to reside in the Tarwad house even after marriage. When such was the Social custom, it was improper for the lady to leave the Tarwad for the husband's house and the karnavan as the director of the morals and maintainer of discipline in the Tarwad might well have refused to maintain her. But now when the practice is changed and it is considered respectable for ladies to accompany their husbands, why should the old rule continue? Formerly, all the members of the family used to reside at the Tarwad house, but now times have changed; requirements of education, and professional duties take the junior members away from the Tarwad house, very properly, and in good many cases to the great advantage of

1. (1909) I. L. R. 32 M. 351 (S. C. 19 M. L. J. 350.

the Tarwad as a whole. Is the Court bound to say that they are not entitled to have separate maintenance? Their Lordships point out that the junior members have a legal right to be maintained as co-owners of the property. Ordinarily the custom being for all the members of the Tarwad to live together they are entitled to be maintained only at the Tarwad house. But if for any proper reason, the junior member is unable to stay at the Tarwad house he is entitled to be maintained—subject of course to this limitation that he is not entitled to receive more than he would have got if he were at the Tarwad house. Having regard to the prevalent practice of ladies accompanying their husbands, their Lordships hold that their leaving the house must be taken to be for a justifiable purpose and that in the absence of waiver, they are entitled to recover maintenance from the Karnavan Mr. Justice Subrahmania Aiyar struck a healthy note when he held in *Neelakanta Thiruvambu* v. *Anantha Narayana Aiyar* [1] that a promise by a deceased Karnavan to pay the English tutor of his Anandravan, was for a binding purpose and enforcible against the succeeding Karnavan. We had earlier held that the wife's maintenance may be properly included in the maintenance allowable to a North Malabar Marumakkathayi. We are glad of the further progress indicated by the cases under notice, though they may prove uncomfortable to many a Karnavan.

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1. (1907) 19 M. L. J. 590.

Sanyasi Baritya v. Artaswaro: I. L. R. 36 M. 287. On principle, the conclusion arrived at by their Lordships Benson and Sundara Aiyar JJ. in this case, seems to be irresistible though one can appreciate the doubts that troubled Turner C. J. and Kindersley J. in the earlier case in *Keshva* v. *Rudran* [1]. It cannot be denied for instance that the conclusiveness given by S. 11, of the Oaths Act to evidence given under S. 9 is limited to the proceedings in which the oath is taken. It cannot also be denied that to hold that a judgment based on oath should operate as *res judicata* is indirectly to extend the conclusive effect of such evidence to other proceedings, which looks somewhat unreasonable. As pointed out by their Lordships Benson and Sundara Aiyar JJ. themselves in the case in *Raja Kumara Venkata Perumal* v. *Thatha Ramasami Chetty* [2] S. 13, C. P. C., (present S. 11) cannot in terms apply to compromise decrees. The distinction between a compromise decree and a decree in a suit involving only one issue, like the genuineness of the document sued upon, decided upon an oath is hardly perceptible. Nevertheless a distinction however fine, does exist between a decree based upon a compromise where the Court has to accept the conclusion from the parties and a decree based upon evidence which the law declares conclusive but whose bearing it is for the Court to determine. The one involves no adjudication by the Court while the other does. If as under the old Regulation (see *Vasudeva Shanbog* v. *Naraina Pillai* [3]) oath was a mode of disposal of the suit and not merely a mode of furnishing a superior species of evidence the conclusion of their Lordships in 5 Mad. 259 would have been the only correct conclusion possible. Assume for instance, after a decision is passed, a certain kind of evidence is declared inadmissible by legislation; would that fact make the decision any the less *res judicata?* One is not also certain that their Lordships would have come to the same conclusion but for the then prevalent misconception as to the effect of *Jenkins* v. *Robertson* [4]. The binding effect of a decision passed on an oath on persons represented by the party on record stands on an entirely different footing. With the more liberal views prevailing as to the powers of karnavans and managing members even those cases that hold

1. (1882) I. L. R. 5 M. 259.
2. (1911) I. L. R. 35 M. 75.
3. (1879) I. L. R. 2 M. 356.
4. (1867) 1 H. L. Sc. & Div. 117.

that such decision does not bind the junior members may require reconsideration—but that is a different matter.

Girdhar Lal Prayagdatt v. Manickamma, I. L. R. 38 B. 10. The old maxim that no man shall set up his own iniquity as a defence any more than as a cause of action has been in course of time subjected to limitations and a distinction of importance is pointed out in the case under notice which if applied logically may perhaps lead further than the learned Judges intended to go. It is stated that as between mortgagor and mortgagee or where a transaction entered into for the purpose of defrauding a third party is still executory or merely in the stage of a contract (as distinguished from a conveyance) the party sought to be bound thereby may be allowed to show its real nature even by setting up his own fraud. In the particular case the learned Judges find that the fraud has not been carried out and that may be sufficient to bring the case within the ordinary rule of granting relief; but if the distinction above suggested is good, it need make no difference whether the fraud has been carried out or not. The observations of the Judicial Committee in the case in *Ram Surun Sing* v. *Mussammat Pran Pearry* [1] are quite general though on the facts of that case, the fraud had not succeeded. Their Lordships put it merely as a case in which the mortgagor is entitled to plead and to show that no money was in fact advanced. Stress is laid in that case by their Lordships as also in other cases on the fact of the mortgagee being out of possession and the mortgagor having merely to defend his possession. It will be interesting to see what decision the courts will give if a suit is brought on the footing of a fraudulent usufructuary mortgage under which the mortgagee has been put in possession and the mortgagor sues to recover possession in denial of the mortgage after the fraud has succeeded. The mortgagee is not entitled to possession except to secure the debt due to himself and the debt can be shown to be non-existent.

In **Ganesh Row v. Tulja Ram Row**, 26 M. L. J. 460. Justice *Wallis* deals with a difficult question of Hindu Law on which there is little or no authority and the conclusion he comes

1. (1870) 13 M. I. A. p. 551.

to is rather hard to support on any principle of equity. The learned Judge relies in great measure on what he regards as the settled practice of the court both here and in the mofussil in such matters but we are not aware of any precedent directly in point. The question for decision was as to the right acquired by a son born after an alienation by the father of his interest in property belonging to a joint family consisting at the date of alienation of the father and his first son. The learned judge holds that the after born son will be entitled to a third share in the properties as they stood after the alienation.

He states that his conclusion follows in large measure from the decision in *Nanjayya Mudali* v. *Shunmuga Mudali* 1. With all respect we do not quite follow his argument. We may assume for the present purpose that, in spite of the alienation, the alienor continues to be a member of the joint-family; but it cannot be contended that the alienation is to have no effect whatever on his rights in the family. In the *Ayyagiri* case 2. *Sir Bashyam Aiyangar* observed at one place that the right of survivorship is incompatible with the position that a member of a Hindu family can alienate his undivided share and interest for value. This of course the learned judge meant to say from the point of view of the alienee. Later on in another part of his judgment, dealing with the position of the members of the family *inter se* he said "An undivided member of a family though he may alienate the whole or any part of his undivided share will continue to be an undivided member of the family with rights of survivorship between himself and the remaining members in respect of all the family property other than what he has transferred." The learned judge felt that this was unfair towards the other members of the family but thought that their only remedy was to become divided; and in any partition to be so made, he said, that the property alienated will be included and debited to the share of the alienor. None of the later cases has had to work out the effect of applying this principle and there is nothing in the judgments in *Nanjayya Mudali* v. *Shunmuga Mudali* 1 throwing light on this question. In the case under notice, the after born sons can acquire right by birth in whatever belonged to their father at the time of their birth. The real question is what is it that belonged to the

1 (1913) 15 M. L. T. 186. 2. (1902) I. L. R. 25 M. 690. F. B.

father after he had alienated his interest in the property. Because he must be regarded as continuing to be a member of the joint family, can it be held that the interest of the other co-parcener *i.e.*, the unalienated portion of the family property is still vested in the father so as to give to the after born son a right by birth therein. We are not at all sure that there is anything either in the Hindu Law texts or in the decided cases to support the view of the learned judge that the fact of the alienation by the father is no reason why the elder brother's share should not be diminished in order to give a share to the after born son. The position of the alienating member is, to say the least, anomalous and it is impossible to work out the rights of the members of the family on a logical basis. In the particular case, it may be said that there is no principle of equity in placing the elder son in a position of advantage as compared with the later born son; but if the principle of the decision is to be applied to cases where the pre-existing co-parceners were brothers or other collaterals, it would appear unjust that the alienating co-parcener's son should be allowed a share at the expense of his uncle. The question will then more pointedly arise as to the application and effect of Sir V. Bashyam Aiyangar's *dictum* that the property alienated should be debited to the share of the alienor.